Re Datuk Lim Kheng Kim, ex p Malayan Banking Bhd

HIGH COURT (PENANG) — BANKRUPTCY NO 29(43)-500-86
MOHAMED DZAIDDIN J
20 APRIL 1990

Bankruptcy — Taxed costs — Application to set off taxed costs of previous proceedings against judgment debt or a stay of execution on payment — Taxed costs subject to solicitor's lien — Whether application can be granted in view of lien — Legal Profession Act 1976, s 116 — Rules of the High Court 1980, O 59 rr 3 & 16(a)

Legal Profession — Taxed costs — Bankruptcy — Application to set off taxed costs of previous proceedings against judgment debt or a stay of execution on payment — Taxed costs subject to solicitor's lien — Whether application can be granted in view of lien — Legal Profession Act 1976, s 116 — Rules of the High Court 1980, O 59 rr 3 & 16(a)

Lien — Solicitor's lien — Bankruptcy — Application to set off taxed costs of previous proceedings against judgment debt or a stay of execution on payment — Taxed costs subject to solicitor's lien — Whether application can be granted in view of lien — Legal Profession Act 1976, s 116 — Rules of the High Court 1980, O 59 rr 3 & 16(a)

The bank, as judgment creditors, obtained a bankruptcy order against the judgment debtor which was later set aside, and the bank was ordered to pay taxed costs to the judgment debtor. Fresh bankruptcy proceedings were then brought against the judgment debtor. In the meantime, the judgment debtor's solicitors served the bank with a demand for payment of taxed costs of $14,576, and threatened to levy execution. The bank then applied to set off the taxed costs against the judgment debt of $2,603,913.28, alternatively for a stay of execution on the payment of taxed costs. The judgment debtor's solicitors submitted that the taxed costs actually belonged to them and not to the judgment debtor; they had a lien on taxed costs under a written agreement made between the judgment debtor and the solicitors, which could not be set off against the debtor's debt.

Held, allowing the bank's application:

(1) Under O 59 r 16(a), the court has power to set off costs against costs. However, these principles should be borne in mind; first, the provisions with regard to set-off of costs between parties are confined to cases in which the costs to be set off against each other are in the same action or proceeding; second, O 59 r 16(a) gives the court a discretion to allow a set-off; third, the English rule that there can be no set-off of costs in bankruptcy proceedings does not apply in our courts.

(2) In this case, the application related to the setting off or staying of execution of costs of previous proceedings. Nevertheless, the court has a discretion to allow a set-off or a stay if it is just, notwithstanding a solicitor's lien.

(3) There is no justice in allowing the debtor to levy execution against the creditor, nor is there any reason why the creditor should pay the costs of the debtor's solicitors if the debtor is unable to do so. The court could not accept that a solicitor accepting the retainer of a person against whom bankruptcy proceedings are pending does so in reliance of the view that the creditor's solicitor may blunder and thus give him the advantage of an order for costs against the creditor.

(4) In the present case, it is just to grant a set-off of the debtor's taxed cost of the $14,576 against the judgment debt of a much more substantial sum of $2,603,913.28, notwithstanding the debtor's solicitor's lien.

[Bahasa Malaysia summary

Bank itu, sebagai pemiutang penghakiman ('pemiutang'), memperolehi satu perintah kebankrapan terhadap penghutang penghakiman ('penghutang') yang kemudiannya diketepikan dan bank itu diperintah membayar kos yang ditetapkan kepada penghutang. Tindakan kebankrapan yang baru kemudiannya dimulakan terhadap penghutang. Sementara itu, peguamcara penghutang telah menuntut daripada bank itu bayaran kos yang ditetapkan sebanyak $14,576, dan mengugut hendak menjalankan perlaksanaan. Bank itu memohon untuk mengimbangi kos yang ditetapkan itu dengan hutang penghakiman sebanyak $2,603,913.28, secara alternatif untuk penggantungan perlaksanaan bayaran kos yang ditetapkan itu. Peguamcara penghutang berhujah bahawa kos yang ditetapkan itu sebenarnya adalah kepunyaan mereka dan bukan kepunyaan penghutang; mereka mempunyai lien ke atas kos yang ditetapkan itu mengikut satu perjanjian yang dibuat di antara penghutang dan mereka, dan jumlah ini tidak boleh diimbangi dengan hutang penghutang.

Diputuskan, meluluskan permohonan itu:

(1) Di bawah A 59 k 16(a), mahkamah mempunyai kuasa mengimbangi kos dengan kos. Meskipun begitu, prinsip-prinsip ini harus diambil ingat; pertama, peruntukan berkenaan pengimbangan kos antara pihak-pihak adalah terbatas kepada kes-kes di mana kos yang hendak diimbangi itu adalah dalam tindakan atau prosiding yang sama; kedua, A 59 k 16(a) memberikan mahkamah budi bicara untuk membenarkan pengimbangan; ketiga, kaedah Inggeris bahawa tidak ada pengimbangan kos dalam prosiding kebankrapan tidak terpakai dalam mahkamah kita.

(2) Dalam kes ini, permohonan ini adalah berkenaan pengimbangan atau penggantungan perlaksanaan kos prosiding yang lebih awal. Namun begitu, mahkamah mempunyai budi bicara untuk membenarkan pengimbangan atau penggantungan jika itu adil, tidak kira lien peguamcara itu.

(3) Tidaklah adil untuk membenarkan penghutang menjalankan perlaksanaan terhadap pemiutang. Juga tidak ada sebab mengapa pemiutang mesti membayar kos peguamcara penghutang jika penghutang itu tidak dapat berbuat demikian. Mahkamah tidak boleh menerima hakikat bahawa peguamcara yang menerima arahan daripada orang telah dikenakan prosiding kebankrapan berbuat demikian bergantung kepada pandangan bahawa peguamcara pemiutang akan membuat kesilapan dan memberinya faedah mendapati perintah kos terhadap pemiutang.

(4) Dalam kes ini, adalah adil untuk membenarkan pengimbangan kos penghutang yang telah ditetapkan sebanyak $14,576 dengan hutang penghakiman yang jumlahnya tersangat lebih sebanyak $2,603,913.28, tidak kira lien peguamcara penghutang.]

[*Editorial Note*: The judgment debtor has appealed to the Supreme Court vide Civil Appeal No 02-245-90.]

Cases referred to

1 *David* v *Rees & Ors* [1904] 2 KB 435 (refd)
2 *Reid* v *Cupper* [1915] 2 KB 147 (refd)
3 *Re Chong Fong Shen* [1932] MLJ 140 (refd)
4 *Re Letchumanan Chetty* [1936] MLJ 224 (refd)
5 *Re A Debtor* (No 21 of 1950) [1951] 1 All ER 600 (folld)

Legislation referred to
Legal Profession Act 1976 s 116
Rules of the High Court 1980 O 59 rr 3, 16(a)

Toh Lee Hong (Ms) for the applicant.
Tan Beng Hong for the judgment debtor.

Cur Adv Vult

Mohamed Dzaiddin J: This is an application for setting off of costs against a judgment debt, or alternatively for a stay of execution for the payment of taxed costs. The primary issue for determination in this summons-in-chambers is whether the court has a discretion to allow a set-off of the debtor's taxed costs against his judgment debt.

The facts

The judgment debtor was truly indebted to Malayan Banking Bhd in the sum of $2,603,913.28 under a judgment obtained against him on 25 January 1986. Upon his failing to settle the said debt the bank proceeded with a bankruptcy action against him in 1986 and he was duly adjudicated a bankrupt by order of this court dated 20 June 1988. He appealed against the said order which was allowed by the Supreme Court on a technicality. He was also given costs which his solicitors had proceeded to tax the bill of costs. In the meantime, the bank served a fresh bankruptcy notice on the debtor demanding payment of the judgment debt of $2,603,913.28. This was followed by a creditor's petition filed in June 1989, which came up for hearing on 3 January 1990 and which had been adjourned to 8 May 1990. On 12 February 1990, the debtor's solicitors served the bank with an allocatur for $14,576 being the taxed costs and threatened to levy execution.

Cik Toh, for the bank, submitted that the court in the exercise of its powers could grant a stay of execution or allow a set-off of the taxed costs of $14,576 against the judgment debt of $2,603,913.28 as the debt owed to the bank is far in excess of the taxed costs.

Encik Tan Beng Hong, on the other hand, contended that the sum of $14,576 as taxed costs actually belonged to the solicitors by virtue of an agreement between the judgment debtor and the solicitors dated 2 November 1986 made under s 116 of the Legal Profession Act 1976. This section permits an advocate and solicitor to enter into a written agreement with the client regarding the amount and manner of payment for his costs in respect of contentious business done by such advocate and solicitor. Encik Tan stated that as this is a solicitor's lien, it cannot be set off against the debtor's debt.

The law

The general rule is that the award of costs shall always be at the discretion of the court. Under O 59 r 3 of the Rules of the High Court 1980, it is stipulated that subject to the provisions of this order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of court. The power of the registrar to set off costs against costs is provided in r 16(a) of O 59 of the Rules of the High Court 1980. The rule states:

> 16 Where a party entitled to be paid costs is also liable to pay costs, the Registrar may —
>
> (a) tax the costs which that party is liable to pay and set off the amount allowed against the amount he is entitled to be paid and direct payment of any balance;

From the cases cited in *Mallal's Supreme Court Practice* (2nd Ed) at p 773, one may notice that there are three principles to bear in mind. First, the provisions with regard to set-off of costs between parties are confined to cases in which the costs sought to be set off against each other are in the same action or proceeding: *David* v *Rees & Ors.*[1] Secondly, this rule gives the court a discretion to allow a set-off: *Reid* v *Cupper.*[2] Thirdly, the English rule that there can be no set-off of costs in bankruptcy proceedings does not apply in our courts: *Re Chong Fong Chen,*[3] which was followed in *Re Letchumanan Chetty.*[4]

However, on the issue before me, the case of *Re A Debtor (No 21 of 1950)*[5] seems to settle the matter beyond any doubt. In that case, the English Divisional Court had held that the court had a discretion to allow a set-off when just, notwithstanding a solicitor's lien. The facts, as taken from the headnote were these. A balance of £409 of a judgment debt not having been paid, the judgment creditors obtained a receiving order against the debtor, but, on an appeal by the debtor to the Divisional Court in Bankruptcy, the order was set aside for technical reasons and the creditors were ordered to pay to the debtor the costs of the appeal and of the proceedings in the county court, which amounted to about £72. The debtor having threatened to levy execution against the creditors in respect of this sum, the creditors applied to the court for a stay of execution of the order for costs. The application was resisted by the debtor on the ground that to grant a stay would be equivalent to allowing a set-off to be made and that (a) a set-off would interfere with the lien of the debtor's solicitor and (b) the judgment creditors would be obtaining payment in full in priority to other possible creditors. Both Harman and Danckwerts JJ went on to discuss at length some of the English cases mentioned in *Mallal's Supreme Court Practice* (2nd Ed) at p 773 with particular reference to the question of a set-off of a solicitor's lien. Perhaps, it is appropriate that I quote the judgment of Harman J at p 695:

> I agree, therefore, with Danckwerts J, in thinking that we have discretion to allow this set-off, or a stay, which amounts to much the same thing, if it be just. In my opinion, it would be right to allow it. I cannot see that as between the parties themselves there can be any justice in allowing the debtor to levy execution against the goods of his creditors, nor do I

think that this ought to be allowed for the sake of the debtor's solicitor. I cannot see any reason why the creditors should pay the costs of the debtor's solicitor if the debtor is unable to do so, nor do I believe that a solicitor accepting the retainer of a person against whom bankruptcy proceedings are pending does so in reliance on the view that the petitioner's solicitor may blunder and thus give him the advantage of an order for costs against the petitioner. Therefore, we propose to grant the stay which is asked for.

I would adopt fully the decision of the Court of Appeal to the present case. Hence, in the exercise of my unfettered discretion, I find it just to grant a set-off of the debtor's taxed costs of $14,576 against the judgment debt of a much more substantial sum of $2,603,913.28 notwithstanding the debtor's solicitor's lien.

Application allowed.

Solicitors: *Lim Huck Aik & Co; Ooi, Lee & Co.*

Reported by *Azra Moiz*

Public Prosecutor v Veeran Kutty & Anor

HIGH COURT (IPOH) — PERAK CRIMINAL TRIAL NOS 13 AND 13A OF 1983
PEH SWEE CHIN J
20 APRIL 1990

Criminal Law — Unlawful possession of revolver and ammunition — Accused leading police to revolver and rounds — Internal Security Act 1960, s 57

Criminal Procedure — Cautioned statement — Breach of lock-up rules — Whether interrogation oppressive — Whether statement made voluntarily — Whether necessary to reduce interrogation to writing — Criminal Procedure Code (FMS Cap 6), s 112

Evidence — Impeachment of witness — Admission of cautioned statement only for impeachment — Weight to be attached to evidence — Similar fact evidence — Probative value versus prejudicial effect — Res gestae — Evidence Act 1950, s 27

Words and Phrases — 'Whenever possible' — Criminal Procedure Code (FMS Cap 6), s 112

The two accused and some others took part in a robbery at Batu Gajah on 7 September 1983. They were apprehended outside the town after being chased by police. During the chase they were observed to have been holding a pistol each. When arrested, they were no longer in possession of the pistols. After being interrogated, both accused led the police back to the place where they were arrested and two pistols and 11 rounds of ammunition were recovered. They were subsequently charged under the Internal Security Act 1960 for unauthorized possession of firearms. In the course of the trial the prosecution sought to admit the accused's cautioned statements and the defence sought to introduce evidence of the armed robbery. Both applications were objected to by the respective opposing parties.

Held, convicting both accused:

(1) There was a breach of the lock-up rules in that the second accused was returned to the lock-up after 6pm. However, the circumstances attending the breach did not amount to oppression making the cautioned statement of the second accused inadmissible.

(2) A total of four hours of interrogation before the statement was recorded could not be construed as oppressive in any way and the cautioned statements of the accused were admissible.

(3) The cautioned statement of the first accused was admissible for the purpose of impeaching his credit, but only as regards the passages underlined for the impeachment of the credit of the first accused.

(4) However, the evidence of the first accused could not be regarded as completely worthless when considered in connection with other evidence and it affected the question of weight to be given to all the evidence of the first accused.

(5) Similar fact evidence may be allowed if it has a sufficient degree of probative force to override any prejudicial effect that it might have and that the said sufficient degree would exist if such evidence of similar fact is very relevant as being strikingly similar that to exclude it would be an affront to common sense. The evidence of the armed robbery was therefore admissible.

(6) The words 'whenever possible' in s 112(v) of the Criminal Procedure Code ought to mean 'whenever reasonably possible'. Given the circumstances of the accused persons' arrest and interrogation, it was not reasonable to expect the interrogation to be reduced to writing.

[Bahasa Malaysia summary

Kedua-dua orang yang tertuduh dan beberapa orang yang lain telah mengambil bahagian di dalam satu rompakan di Batu Gajah pada 7 September 1983. Mereka telah ditangkap di luar bandar itu setelah dikejar oleh pihak polis. Semasa kejaran itu mereka telah diperhatikan membawa sepucuk pistol seorang. Apabila ditangkap, mereka tidak lagi memiliki pistol-pistol itu. Setelah disoal-siasat, kedua-dua orang yang tertuduh itu telah membawa pihak polis balik ke tempat di mana mereka ditangkap dan dua pucuk pistol dan 11 rangkaian peluru telah dijumpai. Mereka kemudiannya dituduh di bawah Akta Keselamatan Dalam Negeri 1960 kerana memiliki senjata api secara haram. Semasa perbicaraan, pihak pendakwa cuba memasukkan pernyataan beramaran yang dibuat oleh yang tertuduh dan pihak pembela cuba memasukkan keterangan tentang rompakan bersenjata itu. Kedua-dua permohonan itu telah dibantah oleh pihak-pihak menentang masing-masing.

Diputuskan, mensabit kedua-dua orang yang tertuduh:

(1) Kaedah-kaedah lokap telah dilanggar apabila yang tertuduh yang kedua dibawa balik ke lokap selepas pukul 6 petang. Walaubagaimanapun keadaan dalam mana pelanggaran itu berlaku tidak merupakan penindasan yang mengakibatkan ketidakbolehterimaan pernyataan beramaran yang tertuduh yang kedua.

(2) Persoalan selama empat jam sebelum pernyataan itu dirakamkan tidak boleh disifatkan sebagai penindasan sama sekali dan pernyataan beramaran yang tertuduh boleh diterima.

(3) Pernyataan beramaran yang tertuduh yang pertama boleh diterima bagi tujuan mencabar kebolehpercayaannya, tetapi cuma setakat bahagian yang digariskan untuk mencabar kebolehpercayaan yang tertuduh yang pertama.